86-117

No.

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RAJINDER SINGH SACHDEV,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether Congress has barred visa revocation from taking effect when notice thereof has not been served as Congress prescribed.

2. Whether petitioner was deprived of substantive due process when his deportability for lack of a valid visa was not assessed in terms of whether the revocation of his visa was statutorily barred from taking effect.

3. Whether the strict construction rule for interpreting restrictive immigration statutes can be waived when the restriction is against the government.

4. Whether the Courts can "estopp" the government by enforcing the sanctions which Congress has imposed for governmental failure to follow the law.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rajinder Singh Sachdev prays that a Writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 22, 1986.

Opinion Below

The opinion below is reported as *Sachdev* v. *INS*, 788 F.2d 912 (2d Cir. 1986) in which the Court of Appeals held that Sachdev was properly found deportable for lack of a valid visa at entry. Specifically, deportability was upheld on three grounds.

First, the Court held that Sachdev's entry visa which was issued on the basis of his being unmarried became automatically revoked when he married during the period in between visa issuance and entry. Second, the Court held that the entry

visa was unquestionably invalid even though notice of the underlying revocation has not been served as Congress prescribed. Finally, the Court held that there was no affirmative misconduct and therefore the "estoppel" doctrine was inapplicable.

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1976 and the jurisdiction of this Court is invoked under 28 USC § 1254(1).

Constitutional Provision Involved

AMENDMENT V

"No persons shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Statute Involved

The statute involved is § 205 of the Immigration and Nationality Act, 8 USC § 1155. This statute reads as follows:

> ". . . The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by Section 235 and 236 . . ."

Statement of The Case

This is a case in which this honorable Court is asked to review an opinion of the Court of Appeals for the Second Circuit which upheld a final order of deportation by the Board of Immigration Appeals.

The Facts

Rajinder Singh Sachdev, the petitioner herein, entered the United States on September 12, 1982 and was admitted as a lawful permanent resident. His father had filed a visa petition on Sachdev's behalf, and the Immigration and Naturalization Service ("INS") approved the petition on the ground that Sachdev was an unmarried son of a lawful permanent resident. Accordingly, Sachdev obtained a "second preference" visa status ("first preference" being reserved for unmarried children of American citizens), pursuant to Section 204 of the Immigration and Nationality Act of 1952, 8 USC § 1154.

On July 4, 1982, one week after submitting his visa application to the American Vice Consul at the American Embassy in India, Sachdev married. Without informing immigration officials of the change in his marital status, Sachdev entered the United States on September 12, 1982. On June 7, 1983, Sachdev filed a petition on behalf of his wife and newborn son, seeking their admission to the United States. The petition, which listed his date of marriage, alerted the INS officials to the fact that Sachdev had married before he entered the United States.

Accordingly, the INS commenced deportation proceedings against Sachdev on July 3, 1983, and an Immigration Judge found Sachdev deportable pursuant to 8 USC § 1251. The Board of Immigration Appeals affirmed the decision on March 7, 1985, and dismissed the appeal. On July 29, 1985, Sachdev petitioned the Court of Appeals for review of the BIA order, and said petition was denied on April 22, 1986.

Chronology of Proceedings Below

The foregoing statement of facts clearly reflects the various stages of this case and the time periods involved. Therefore, a separate chronology is unnecessary.

Reasons For Granting The Writ

The Writ should be granted pursuant to Supreme Court Rule 17 which, among other things, provides that the Court will review judgments of lower courts which have decided federal questions in a way which conflicts with applicable decisions of this Court.

In recent times, this Court has found it necessary to curb "judicial activism" in the immigration field by holding that, under our tripartite system of government, the judicial branch would be usurping congressional supremacy in immigration when restrictive immigration statutes are interpreted in such a way that the restrictive thrust is diluted. The opinion of the Court of Appeals, in interpreting § 1155 of 8 USC, is in conflict with the strict policy of this Court to maintain congressional supremacy in immigration matters.

Paradoxically, § 1155 grants absolute power to the executive branch to revoke visas but provides that such revocation shall have no effect when notice thereof is not served on the two parties involved in the visa status, namely, the visa-petitioner and the beneficiary of the vias-petition.

Should this honorable Court choose to enforce the no-effect provision, the fact that it favors the alien and not the government would perhaps send the clearest signal to the lower courts that congressional policy in immigration matters must be enforced regardless of its harshness.

I

Congress Has Barred Visa Revocation From Taking Effect When Notice Thereof Has Not Been Served As Congress Prescribed

Sachdev concedes that his visa was revoked when he married during the period in between visa issuance and entry. What he is contending is that the visa revocation did not take effect because, under 8 USC § 1155, Congress barred visa revocation from taking effect when notice of such revocation was not served as Congress prescribed.

Under the first part of 8 USC § 1155, Congress granted the Attorney General unlimited power to revoke the validity of visa petition approvals and, thus, to revoke the visa status based on the petition approval. See § 203(d) of the I&N Act [8 USC §1155(d)]. See also *Sachdev* v. *INS*, 788 F.2d 912, at 913 (2d Cir.1986). However, in the second part of § 1155, Congress prescribed certain conditions under which the visa revocation shall have no effect:

> ". . . In no case, however, shall such revocation have effect *unless* there is mailed to the *petitioner's* last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the *beneficiary* of the petition before such beneficiary commences his journey to the United States . . ." (Emphasis Supplied).

The two notices prescribed above were not served upon Sachdev and his father. Therefore, the otherwise valid visa revocation did not take effect, and INS was barred from deporting Sachdev for lack of a valid visa, said invalidity never having taken effect. This claim was pressed by Sachdev in his petition for review to the Court of Appeals. However, as will be shown below, the claim was side-stepped in the Court's opinion.

II

Petitioner Was Deprived Of Substantive Due Process When His Deportability For Lack of A Valid Visa Was Not Assessed In Terms of Whether The Revocation of His Visa Was Statutorily Barred From Taking Effect

This Court has consistently held that the loss of permanent resident status is a protectible liberty interest as to which the requirements of due process unequivocally apply. See e.g. *Chew* v. *Colding*, 344 U.S. 590 (1953); and *Landon* v. *Plasencia*, 459 U.S. 21 (1982). Therefore, due consideration must be given to any *material* claim seeking to overturn a finding of deportability against a permanent resident alien.

Petitioner sought to prevent the loss of his permanent resident status by claiming that, under 8 USC § 1155, the revocation of his visa did not take effect because notice of such revocation was not served on himself and his father as the statute requires. This claim was material and quite deserving of at least a *direct* rejection by the Court of Appeals. However, this claim was side-stepped by the Court of Appeals when it stated as follows:

> ". . . The substance of petitioner's claim is that the INS failed to abide by the notice requirements of 8 USC § 1155, which provides that the revocation of an approved visa petition has no effect "unless notice of the revocation is communicated through the Secretary of State to the *beneficiary* of the petition before such beneficiary commences his journey to the United States." Sachdev claims that because *he* did not receive notification in India concerning the revocation of his visa petition, the INS now is precluded by its own *regulations* from deporting him. We disagree . . .". (Emphasis Supplied).

In the foregoing, the Court of Appeals made it appear as if 8 USC § 1155 mandates only one notice to the beneficiary of

the visa-petition and not one to the visa-petitioner as well. Secondly, the Court made it appear as if petitioner was claiming that it was the regulations and not the statute itself which barred the revocation of his visa from taking effect. By so doing, the Court itself deprived petitioner of substantive due process. Such deprivation was particularly injurious because one of the purposes of the three Judge panel in the judicial review procedures of 8 USC § 1105(a) *et seq* was to give an alien a meaningful day in Court on the question of deportability.

III

The Strict Construction Rule For Interpreting Restrictive Immigration Statutes Cannot Be Waived When The Restriction is Against The Government

As its justification for interpreting 8 USC § 1155 in the way it did, the Court of Appeals cited the absence of judicial authority to the contrary and opined that to do otherwise ". . . would invite fraud by petitioners seeking similar status." Such an interpretation flies in the face of this Court's unconditional directive that, in order for congressional supremacy in immigration matters to remain sacred, the courts must strictly construe restrictive immigration statutes so as to effectuate the restrictive thrust reflected in their plain language. *INS* v. *Jong Ha Wang*, 450 US 139 (1982); and *INS* v. *Phinpathiya*, 464 US 183 (1984).

Clearly, the language of 8 USC § 1155 reflects a congressional intent to nullify the visa revocation authority of INS officials when they fail to follow the notice requirements of the statute. This intent of *Congress* cannot be subordinated to the well-meant intent of the *judicial* branch to prevent fraud; especially since there is a fraud statute in 8 USC § 1182(a)(19). The strict construction rule which our highest Court has ordered to be followed for protecting congressional supremacy in immigration matters must be followed by the lower courts.

Otherwise, the authority of our highest Court will be undermined. See generally *Hutto* v. *Davis*, 102 S.Ct. 703 (1982).

IV

The Courts Can Estopp the Government By Enforcing the Sanctions Which Congress Has Imposed for Governmental Failure to Follow the Law

The Court of Appeals held that the facts of the case did not demonstrate misconduct by governmental officials and therefore it was unnecessary to reach the question of the applicability of the Supreme Court's estoppel holding in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984). Petitioner submits that, because Congress has prescribed a notice procedure and a penalty for its nonobservance, governmental misconduct inhered within the INS failure to serve the revocation notices on petitioner *and* his father. Therefore, the Court of Appeals should have reached the question of the applicability of the Supreme Court's holding in *Heckler* v. *Community Health Services*, *supra*.

In the instant case, the petitioner is claiming that the INS is estopped from deporting him for lack of a valid visa because the INS did not serve the notices prescribed by Congress in 8 USC § 1155. However, in asking for estoppel relief, he is not asking the Court to fashion a remedy of its own. A remedy already exists in 8 USC § 1155 which bars visa invalidity from taking effect when the notices are not served. Therefore, in "estopping" deportation for lack of a valid visa, a person in a § 1155 case does not have to meet the heavy burden imposed by *Heckler* v. *Community Health Services*, *supra*. This is because the statute itself has fashioned the very remedy which the alien seeks in respect of the government's failure to follow the law.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should issue and the judgment of the Court of Appeals be reversed to effectuate the congressional policy underlying the notice requirements in § 1155 of 8 USC.

Respectfully submitted,

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July 18, 1986